FILED
JUL 2 1991
OFFICE OF THE CLERK

No. 90-1074

*IN THE*

# Supreme Court of the United States

*OCTOBER TERM, 1990*

*WAYNE ESTELLE, WARDEN,*
*Petitioner,*

*v.*

*MARK OWEN McGUIRE,*
*Respondent.*

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## REPLY BRIEF FOR PETITIONER

DANIEL E. LUNGREN
Attorney General

GEORGE WILLIAMSON
Chief Assistant Attorney General

JOHN H. SUGIYAMA
Senior Assistant Attorney General

MORRIS BEATUS
Supervising Deputy Attorney General

DANE R. GILLETTE
Deputy Attorney General
[Counsel of Record]

455 Golden Gate Avenue
Room 6200
San Francisco, CA 94102
Telephone: (415) 557-1475

*Attorneys for Petitioner*

## Table of Contents


| | Page |
|---|---|
| ARGUMENT | 1 |
| **NEITHER THE EVIDENCE OF OTHER INJURIES TO THE MURDER VICTIM AND OF OTHER MISCONDUCT BY RESPONDENT NOR THE JURY INSTRUCTION RELATING TO THAT EVIDENCE DENIED RESPONDENT A FUNDAMENTALLY FAIR TRIAL.** | 1 |
| A. Admission Of Evidence | 2 |
| B. Jury Instruction | 4 |
| C. Respondent's Trial Was Fundamentally Fair | 8 |
| CONCLUSION | 10 |

## Table of Authorities


| | Page |
|---|---|
| **Cases** | |
| *Bates v. McCaughtry*<br>1991 U.S. App. LEXIS 10891 (7th Cir. 1991) | 3 |
| *Boyde v. California*<br>___ U.S. ___<br>110 S.Ct. 1190 (1990) | 7 |
| *Coleman v. Thompson*<br>___ U.S. ___<br>59 L.W. 4789 (1991) | 8 |
| *Francis v. Franklin*<br>471 U.S. 307 (1981) | 4, 6 |
| *Marshall v. Lonberger*<br>459 U.S. 422 (1983) | 3 |
| *McCleskey v. Zant*<br>___ U.S. ___<br>111 S.Ct. 1454 (1991) | 7, 8 |
| *McGuire v. Estelle*<br>902 F.2d 749 (9th Cir. 1990) | 2, 5 |
| *Moore v. Illinois*<br>408 U.S. 786 (1972) | 2, 5 |
| *Sandstrom v. Montana*<br>442 U.S. 510 (1979) | 7 |
| *Sawyer v. Smith*<br>___ U.S. ___<br>110 S.Ct. 2822 (1990) | 4 |




## Table of Authorities, cont'd


| | Page |
|---|---|
| *Schneckloth v. Bustamonte*<br>412 U.S. 218 (1973) | 8 |
| *Spencer v. Texas*<br>385 U.S. 554 (1967) | 3 |
| *Teague v. Lane*<br>489 U.S. 288 (1989) | 4 |
| *Ulster County Court v. Allen*<br>442 U.S. 140 (1979) | 6 |
| *Yates v. Evatt*<br>___ U.S. ___<br>59 LW 4509 (1991) | 7 |
| **Constitutional Provisions** | |
| United States Constitution<br>Fourteenth Amendment | 3, 8 |
| **Statutes** | |
| California Evidence Code<br>§ 1101 | 3 |

No. 90-1074

---

*IN THE*

**Supreme Court of the United States**

*OCTOBER TERM, 1990*

---

*WAYNE ESTELLE, WARDEN,*
*Petitioner,*

*v.*

*MARK OWEN McGUIRE,*
*Respondent.*

---

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

---

**REPLY BRIEF FOR PETITIONER**

**ARGUMENT**

**NEITHER THE EVIDENCE OF OTHER INJURIES TO THE MURDER VICTIM AND OF OTHER MISCONDUCT BY RESPONDENT NOR THE JURY INSTRUCTION RELATING TO THAT EVIDENCE DENIED RESPONDENT A FUNDAMENTALLY FAIR TRIAL.**

Respondent[1] contends that the evidence of Tori's earlier injuries and respondent's documented brutal

---

1. We refer to Respondent's Brief as RB and the amici brief filed on behalf of two defense counsel organizations as Defense Attorneys; we follow respondent's designation of Petitioner's Brief and the amici briefs filed in support of our position. RB at 3, n. 1.

mishandling of the child and abuse of his wife was improperly admitted. He also asserts that the challenged jury instruction allowed the evidence to be used improperly. The amici brief filed in support of respondent argues that evidence of propensity is constitutionally inadmissible, then asserts that the prior injuries and misconduct had no probative value except to demonstrate a propensity towards violence. Both arguments apparently abandon at least one basis for the Ninth Circuit's decision: that is, that the evidence was inadmissible on the issue of Battered Child Syndrome.

## A. Admission Of Evidence

In its order reversing respondent's murder conviction, the circuit court concluded that proof of prior injuries to support a diagnosis of Battered Child Syndrome was "incorrectly admitted . . . pursuant to California law . . . ." *McGuire v. Estelle*, 902 F.2d 749, 754 (9th Cir. 1990). This holding was contrary to the conclusions of the state trial and appellate courts. Although respondent discusses the limits, as he views them, of state law on the admission of prior injuries in a child abuse case, RB at 24-28, he focuses less on the *admission* of the evidence than on its permissible *use* under the instructions. He thus tacitly recognizes that state-law questions relating to the admission of evidence are not properly the subject of habeas corpus review. *See* PB at 18; *Moore v. Illinois*,



408 U.S. 786, 799 (1972) (admissibility of evidence under state law not subject to review by this Court). As the Seventh Circuit recently emphasized, "whether the state court correctly understands the law is a question beyond the reach of a federal court on collateral attack." *Bates v. McCaughtry*, 1991 U.S. App. LEXIS 10891 at *9 (7th Cir. 1991), decided May 30, 1991 in 89-3195. The question, therefore, is not whether state law allowed admission of the prior injury or misconduct evidence, but whether the instructions allowed use of the evidence for an unconstitutional purpose. We consider the instruction below.

The amici discussion of character evidence and its historical development is interesting but ultimately unenlightening. As noted in their brief, California generally precludes evidence of character to prove conduct on a specified occasion. *See*, Calif. Evid. Code § 1101. Whether the Due Process Clause prohibits evidence offered solely to demonstrate criminal propensity, as amici argue, need not detain by this Court because the evidence was not offered or used for that purpose.[2] As discussed

---

2. We note, however, that while "the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial," the clause has never been viewed by "this Court as a rule-making organ for the promulgation of state rules of criminal procedure." *Spencer v. Texas*, 385 U.S. 554, 563-564 (1967). The "Due Process Clause does not permit the federal courts to engage in a finely tuned review of the wisdom of state evidentiary rules . . . ." *Marshall v. Lonberger*, 459 U.S. 422, 438-439, n. 6 (1983). In short, there is no basis for holding that the Fourteenth Amendment

in our opening brief, PB at 34-35, evidence of the prior injuries to Tori supported the battered child diagnosis; the attacks on respondent's wife rebutted portions of her testimony; and evidence of the mistreatment of Tori by respondent was admitted without objection. We thus turn to the instruction and the purposes for which the jury was allowed to consider this evidence.

**B. Jury Instruction**

Respondent and amici discuss at length the jury's consideration of the prior injuries and misconduct, but focus almost exclusively on one instruction, which they, like the Ninth Circuit, inappropriately extract and isolate out of context. *Francis v. Franklin*, 471 U.S. 307, 315 (1981). Even so, the instruction at issue did not authorize the jury to consider the evidence in any unconstitutional manner.

The trial court instructed the jury that evidence showing the commission by respondent of acts similar to

---

mandates that the states follow specific evidentiary rules.

Moreover, the rule proposed by amici arguably violates the prohibition against creation of new rules on federal habeas corpus first announced in *Teague v. Lane*, 489 U.S. 288 (1989). The mere fact that a rule of evidence has been adopted by the states does not mean that it is compelled by the Constitution. Amici's effort to avoid this problem, Defense Attorneys at 12, n. 6, is completely inconsistent with this Court's development of the *Teague* doctrine in *Sawyer v. Smith*, ___ U.S. ___, 110 S.Ct. 2822, 2829-2830 (1990).



those constituting the charged offense had been admitted, but that evidence, "*if believed*," could *not* be considered to prove that respondent was a person of bad character or had a disposition to commit crimes. Rather, it could only be considered for one of three purposes: (1) to impeach Mrs. McGuire's testimony that she had no reason to fear respondent; (2) to establish the battered child syndrome; or (3) to permit the logical conclusion that petitioner committed the murder if the jury found a "*clear connection*" between the other offenses and the charged crime. J.A. 40-41, emphasis added.[3/] Nothing in the Constitution prohibits a state court jury from considering evidence of misconduct if it believes the evidence, finds a clear connection between those acts and the charged offense, and logically concludes that if the defendant committed those offenses, he also committed the charged crime. *See, e.g., Moore v. Illinois*, 408 U.S. at 799-800 (admission of shotgun found in defendant's car but concededly not the murder weapon was not "so irrelevant or so inflammatory" that defendant was denied a fair trial).

The thrust of respondent's complaint is that the instruction allowed the jury to infer his guilt from Tori's prior injuries despite the absence of evidence establishing that petitioner caused those injuries. The evidence,

---

3. The word "clear" in part three was excluded from the Ninth Circuit's quotation of the instruction. *Compare* 902 F.2d at 754 *with* J.A. 41; *see* SG 6-7, n. 1.

however, showed that only respondent and his wife cared for the baby; that respondent had no explanation for bruises discovered by Mrs. McGuire on Tori before the fatal blows; that respondent had handled the baby in an irresponsible and brutal manner; that respondent had exclusive custody of Tori before her death; that the fatal wounds could not have been inflicted at the time Mrs. McGuire claimed she struck Tori; that respondent had no answer when his wife accused him in the waiting room of being "responsible" for Tori's condition; and that respondent's proffered explanation for the injuries was physically impossible. In short, if the jury believed the prosecution evidence, it could logically conclude that respondent was responsible for Tori's past injuries and the fatal blows delivered on July 7, 1981.

Respondent equates the limiting instruction on consideration of other misconduct evidence with cases involving unconstitutional mandatory presumptions. The effort is unpersuasive.

When considering a claim of this sort, the Court must first determine whether the instruction creates a mandatory presumption or a permissive inference. *Francis v. Franklin*, 471 U.S. at 314. A mandatory presumption offends due process by telling the jury that it must find the elemental fact upon proof of the basic fact unless the defendant rebuts the presumed connection. *Ulster County Court v. Allen*, 442 U.S. 140, 157 (1979). An inference, however, simply suggests a possible conclusion



to be drawn if the state proves the predicate facts, but does not require the jury to draw that conclusion. *Francis*, at 314. The Court must examine the evidentiary device as described by the actual language of the instruction and the manner "in which a reasonable person could have interpreted the instruction." *Sandstrom v. Montana*, 442 U.S. 510, 514 (1979); *see also*, *Yates v. Evatt*, ___ U.S. ___, 59 LW 4509, 4512 (1991).[4]

The language of the prior misconduct instruction is entirely permissive. The jury was told that evidence could be considered *if believed* only for certain limited purposes. The prior misconduct could be used to infer guilt only if the jury found a "clear connection" between those acts and the charged offense. The evidence could not be considered for any other purpose. No reasonable juror would interpret the instruction as undermining his or

---

4. In *Boyde v. California*, ___ U.S. ___, 110 S.Ct. 1190, 1198 (1990), the Court held that the appropriate test for an instruction which is not concededly erroneous is "whether there is a reasonable likelihood that the jury" applied the instruction in an unconstitutional manner. The Court concluded that this test "better accommodates the concerns of finality and accuracy" than the "single hypothetical 'reasonable' juror" used in *Sandstrom* and the other presumption cases. *Id.* In *Yates*, however, the Court returned to the "reasonable juror" standard. Respondent's discussion intermingles the two tests. RB at 40-41. Given the Court's recent emphasis on the importance of finality in habeas review of state court convictions, *McCleskey v. Zant*, ___ U.S. ___, 111 S.Ct. 1454, 1468-1469 (1991), we think that the reasonable likelihood test of *Boyde* and focus on the jury as a whole is the better approach to review of instructions. Because the instruction in this case was proper under any test, we follow the reasonable juror standard of *Yates*.

her obligation to find the ultimate facts beyond a reasonable doubt. This Court's presumption cases are inapplicable.

## C. Respondent's Trial Was Fundamentally Fair

In Argument II of Petitioner's Brief on the Merits we urged the Court to develop a test for determining whether a state criminal defendant was denied a fundamentally fair trial. PB at 38-49. Specifically, we argued that a defendant is not denied fundamental fairness due to the admission of challenged evidence unless a reasonable probability appears that exclusion would have produced a more favorable result. PB at 46-47. Neither respondent nor his amici has challenged the need for or formulation of that test.[5/] Just as the Court found it appropriate to "define the doctrine of abuse of the writ with more precision" in *McCleskey v. Zant*, 111 S.Ct. at

5. Amici's defense of habeas corpus review as the proper remedy for denial of a fundamentally fair trial, Defense Attorneys at 23-30, is based primarily on the "revisionist view" of habeas corpus, *Schneckloth v. Bustamonte*, 412 U.S. 218, 252 (1973) (Powell, J., concurring), which this Court abandoned in recent cases. *See, e.g., McCleskey*, 111 S.Ct. at 1468-1469; *Coleman v. Thompson*, ___ U.S. ___, 59 L.W. 4789, 4795-96 (1991). We recognize that federal review is appropriate "when a petitioner raises a meritorious constitutional claim in a proper manner in a habeas petition." *McCleskey*, at 1469. The limited scope of that review when the claim is based not on a specific constitutional provision but on the Due Process Clause of the Fourteenth Amendment is best defined by the reasonable probability test set forth in our opening brief.



1467, the time is ripe to define with more precision the limits of a fundamentally fair trial.

Neither the prior misconduct or injury evidence, nor the instruction defining its use, was prohibited by any specific constitutional provision. The impact of Tori's prior injuries and the battered child diagnosis has been discussed. PB at 47-49. Because the evidence and the jury instruction do not undermine confidence in the conviction for second degree murder, respondent received a fundamentally fair trial.

## CONCLUSION

We respectfully request that the judgment of the Court of Appeals be reversed.

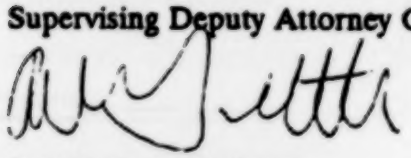
DATED: July 2, 1991.

DANIEL E. LUNGREN
Attorney General

GEORGE WILLIAMSON
Chief Assistant Attorney General

JOHN H. SUGIYAMA
Senior Assistant Attorney General

MORRIS BEATUS
Supervising Deputy Attorney General



DANE R. GILLETTE
Deputy Attorney General
[Counsel of Record]

Attorneys for Petitioner

DRG:dm